SUPREME COURT, U. S.

APR 18

MICHAEL RODAK, JR.

No. 73-1033

In the Supreme Court of the United States

OCTOBER TERM, 1973

VOYAGER 1000, ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 79–96) is reported at 489 F. 2d 792. The opinion of the Civil Aeronautics Board (Pet. App. 62–77) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 78) was entered on November 14, 1973. The petition for a writ of certiorari was filed on January 2, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTION PRESENTED

Whether substantial evidence and a reasonable legal basis support the Civil Aeronautics Board's determina-

tion that Voyager 1000, an "air travel club" furnishing air transportation to its members, was engaged in the unauthorized carriage of persons by aircraft as a common carrier.

STATUTE INVOLVED

Sections 101(3), 101(10), 101(21), and 401(a) of the Federal Aviation Act of 1958, 72 Stat. 737, as amended, 49 U.S.C. 1301(3), 1301(10), 1301(21), and 1371(a), are set forth at Pet. 3–4.

STATEMENT

The Civil Aeronautics Board charged petitioner Voyager 1000 with engaging in interstate, overseas, and foreign air transportation "as a common carrier [of persons] for compensation or hire" (Section 101(21) of the Federal Aviation Act, 49 U.S.C. 1301(21)), without a certificate of public convenience and necessity from the Board, in violation of Section 401(a) of the Act, 49 U.S.C. 1371(a). After a full administrative hearing, the Board found the following facts.

Petitioner is an organization which is in form a private club. It was created to provide, and was in fact providing, low-cost transportation by air to its members (Pet. App. 63, 66). The members, in turn, were solicited from the general public through mass-media advertising of Voyager flight schedules and fares (Pet. App. 48–59, 64–65). There was no screening of applicants for membership, and no applicant was ever rejected if he tendered the requisite fees (Pet. App. 65–66). Membership qualification consisted of payment of as little as $31 for an entire family,

covering an initiation fee and dues (Pet. App. 65, 71). In return for this payment, the new member and his family could immediately take advantage of an extensive program of Voyager flights at a fraction of even the discount fares of the airlines (Pet. App. 71, n. 12).

The Board found that petitioner "widely promoted and provided air transportation to the general public in return for the payment of money" (Pet. App. 72) and that, "despite the various labels Voyager attaches to itself and to various aspects of its method of operation, it is 'furnishing transportation by air to the general public on a commercial basis'" (*ibid.*). It accordingly concluded that petitioner was "engaged in 'air transportation' within the meaning of the Act. Lacking operating authority from the Board, Voyager's operations are in violation of section 401(a) of the Act" (*ibid.*).[1]

The court of appeals affirmed (Pet. App. 79–96). It held that "[t]here was substantial evidence and a reasonable basis in law" for the Board's determination (Pet. App. 95).

ARGUMENT

The decision of the court of appeals is correct, and there is no reason for further review.

1. The Board correctly determined that petitioner was operating as a "common carrier." "Common car-

[1] The presiding examiner had concluded that petitioner was not a common carrier. The Board approved the examiner's findings of fact but took a different view of the legal significance of the facts.

rier" is an "ancient * * * [concept] in our law" which has been applied over the years in a wide variety of factual situations (*Las Vegas Hacienda, Inc.* v. *Civil Aeronautics Board*, 298 F. 2d 430, 433 (C.A. 9), certiorari denied, 369 U.S. 885). "[T]he dominant factor in fixing common carrier status * * * is the presence of a 'holding out' to transport the property or person of any member of the public who might choose to employ the proffered service. *State of Washington ex rel. Stimson Lumber Company* v. *Kuykendall*, 275 U.S. 207, 211–212" (*id.* at 434).

"Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does." *United States* v. *California*, 297 U.S. 175, 181. Neither intent nor the labels attached to its activities are determinative. *Horning* v. *District of Columbia*, 254 U.S. 135, 137.

Common-carrier status cannot be avoided because the service is limited to individual contracts between the transportation concern and the user of its services. If, within the limits of its facilities, an organization holds itself out to contract with all who meet its terms, it is a common carrier. *Producers Transportation Co.* v. *Railroad Commission*, 251 U.S. 228. In the case of a membership organization, moreover, the conditions of membership are equivalent to specific contractual terms, and, when such membership is offered to anyone willing to meet those conditions, common carriage results. *Consolidated Flower Shipments* v. *Civil Aeronautics Board*, 213 F. 2d 814 (C.A. 9).

2. In light of these principles, the Board's decision

has substantial evidentiary support and a reasonable basis in law.[2] Since petitioner was concededly providing "carriage by aircraft of persons" and doing so "for compensation or hire" (49 U.S.C. 1301(21)), the question was whether it had "held out its services to the general public" (Pet. App. 69–70)—*i.e.*, whether, under the *Hacienda* formulation, it had been "furnishing * * * transportation by air *to the general public* on a commercial basis" (298 F. 2d at 436; emphasis added).

In finding that petitioner's services were held out to the general public, the Board noted that petitioner's "extensive flight schedules have been widely advertised to the public" (Pet. App. 70), and that it had long ago ruled that "[t]he most obvious method of a holding out which may result in common carriage is advertising through magazines, newspapers, posters, brochures, and the like" (*Transocean Air Lines, Inc.*,

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[2] As the Board noted, this case is virtually indistinguishable from *Consolidated Flower Shipments*, *supra*. The Board explained (Pet. App. 72, n. 15):

"It [*Consolidated Flower*], too, involved a nonprofit corporation performing a transportation service—a cooperative of members who were flower shippers. It, too, involved widespread solicitation of membership. In finding the cooperative to be engaged in common carriage, the Board rejected a defense based on the fact that it was a nonprofit corporation whose services were available only to its members. The Board said (16 C.A.B. at 805):

"'The fact that membership in Bay Area is a prerequisite to obtaining its services does not detract from this conclusion [that the cooperative was a common carrier], since membership is readily attainable, involves no obligation other than the payment of nominal dues, and has as its sole purpose eligibility for Bay Area's services.'"

11 CAB 350, 352–353).[3] The Board recognized (Pet. App. 70–71) that "one responding to Voyager's public solicitation must become a 'member' before he can take a Voyager flight and that, to that end, he must pay an 'initiation fee' and a part of his 'annual dues.'" But it was unwilling to treat "these requirements and the labels attached to them" as controlling, because that would "exalt form over substance" (Pet. App. 71).

The Board thus found that petitioner is a common carrier, despite its trappings, because (Pet. App. 71) "the very reason for Voyager's existence is the [provision of] transportation"; "the basic reason for obtaining 'membership' is to take advantage of its transportation service"; and "'members' are solicited from the public at large and join with ease [*i.e.*, for a small fee and with no screening] for the purpose of obtaining transportation at reduced rates." The court of appeals concluded that these findings are supported by substantial evidence, and petitioner has not shown that the court "misapprehended or grossly misap-

[3] Petitioner contends (Pet. 18–19) that the advertisements were addressed to "Voyager Members Only" and were merely a means of communicating with existing members regarding flight plans. Apart from the fact that not all advertisements carried that legend (Pet. App. 70), the Board found that "the most reasonable inference, and the one we draw, is that the advertising was designed to reach and attract those who were not already members" (*ibid.*). This determination was consistent with petitioner's answer to the complaint, in which it acknowledged that the advertisements were designed to "solicit * * * new members" (J.A. 24–25).

plied" that standard (*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491). There is consequently no reason for review by this Court.

3. *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, on which petitioner relies (Pet. 9–10), is inapposite. The Court held in that case that the respondent should have been permitted to show, in defense to a criminal prosecution, that it had been "affirmatively misled by the responsible administrative agency into believing that the law did not apply in this situation" (411 U.S. at 674). The proceeding in this case, of course, was not a criminal prosecution. Moreover, whatever reliance petitioner may have placed on the opinion of the Federal Aviation Administration (see Pet. 9; Pet App. 86), the Civil Aeronautics Board, not the FAA, is the "responsible administrative agency" with respect to enforcement of Section 401(a) of the Act.

United States v. *Contract Steel Carriers, Inc.*, 350 U.S. 409, on which petitioner also relies (Pet. 19–20), involved the definition of a "contract carrier" under the Motor Carrier Act. There is no comparable provision in the Federal Aviation Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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